FEB 28 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 703

THE HUDSON COAL COMPANY,

Petitioner,

against

ARJA WATKINS, et al.,

Respondents.

PETITION FOR REHEARING

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

INDEX

PAGE

Petition for Rehearing 1

I—Protracted litigation affecting thousands of employees in the Anthracite Industry appears unavoidable unless there is a final and authoritative determination of the second and third questions presented by the petition 1

Conclusion 6

Counsel's Certificate 7

CITATIONS

Cases:

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697 4

Clarence Timony, et al. v. Todd Shipyards Corporation, October Term, 1945, No. 758 2

D. A. Schulte Inc. v. Gangi, October Term, 1945, No. 517 4

Donahue v. Susquehanna Collieries Co., 138 F. 2d 3.. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 703

THE HUDSON COAL COMPANY,

Petitioner,

against

ARJA WATKINS, et al.,

Respondents.

PETITION FOR REHEARING

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Hudson Coal Company, respectfully prays for a rehearing of the order of this Court dated February 4, 1946 denying its petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit and assigns therefor the following reasons:

I

Protracted litigation affecting thousands of employees in the Anthracite Industry appears unavoidable unless there is a final and authoritative determination of the second and third questions presented by the petition.

The present case involves thirty-eight (38) employees of a single anthracite producing company. There are at

least four thousand (4,000) employees of more than one hundred (100) other employers in the Pennsylvania anthracite fields who undoubtedly will assert immediate claims under the Fair Labor Standards Act of 1938 on the basis of the Circuit Court's ruling in this case. Moreover, viewing that ruling from the broader viewpoint of its effect on the judicial functions of the Anthracite Board of Conciliation as ultimate arbiter of all wage disputes in the Industry, it affects the entirety of the Industry's seventy-five thousand (75,000) organized employees.

Consistent with the modern trend towards arbitration of labor disputes, the Third Circuit Court determined in this case and in its previous decision, *Donahue* v. *Susquehanna Collieries Company,* 138 F. 2d 3 (1943), that an employee's claim for additional wages under the Fair Labor Standards Act is subject to arbitration where the employer and employee have so agreed.*

Petitioner's quarrel with the Circuit Court begins with the ruling that the legality of the hourly rate provisions of the successive anthracite wage agreements covering employees in "occupations continuously manned" for the period November 1, 1939 to April 30, 1943 (R. 41-45) and the legal effect of the settlement agreement contained in Section 7 of the 1941 Agreement (R. 44), are questions of law "which the Court must take responsibility in answering" (R. 96).

---

* For indications of the use of arbitration to settle such disputes in other industries, see 9 Wage and Hour Reporter 3, January 7, 1946.

No challenge of this principle was made in this case by cross-petition nor did the employees in the *Donahue* case, *supra,* seek a review after denial of rehearing by the Circuit Court. To the best of our knowledge, only one attempt has been made to seek a review of this question and in that case, the lower courts had found no occasion to decide the question. See *Clarence Timony, et al.* v. *Todd Shipyards Corporation,* October Term, 1945, No. 758, certiorari denied, February 11, 1946.

The Circuit Court offers no authority to support its usurpation of the arbitral function to determine legal questions other than the existence of the arbitration agreement and respondents' default. To the best of our knowledge, there is no such authority to be found either in the United States Arbitration Act or elsewhere. Certainly the question of the Court's power is a novel one in this Court.

Petitioner goes further. Not only did the Court lack power to decide questions of law affecting the merits of the controversy between employer and employees; it lacked power to decide certain questions of fact as a basis for deciding these legal questions. And even assuming the Court's power in this respect, petitioner has demonstrated at length in its petition (pp. 10-19 incl.) how its case was resolved solely upon a limited stipulation of facts without "its day in court."

The critical issue on the merits in this case is, and in the case of 4,000 additional employees and their 100 employers will be, whether or not the hourly rates under the aforementioned provisions of the successive wage agreements were *bona fide* rates. The Circuit Court's opinion states it thus (R. 92):

> "But whether the regular rate was explicitly stated or had to be figured out as indicated, the *essential test of its sufficiency was whether it was an actual regular rate or a fictitious one.*" (Italics ours.)

Petitioner in this case was never afforded opportunity to show that it actually applied the contract rates in calculating respondents' wages. The stipulated due bills (R. 52-62) were treated as conclusive despite their obvious immateriality in deciding petitioner's motion for a stay pursuant to Section 3 of the Arbitration Act, as the decision of the Circuit Court undeniably demonstrates, and despite petitioner's reservation of right (R. 53) to offer

complete and explanatory evidence in a plenary hearing before the arbitrator or the Court.

If the Circuit Court's decision is now permitted to stand without review by this Court, the District Court inevitably will be called upon by each affected employer, including Petitioner in other cases, to hear the full evidence showing that the formula or contract rates were actually applied and were not fictitious. Depending upon the District Court's findings, the cases will then go to the Board of Conciliation, as indicated by the Circuit Court (R. 96), for determination of the overtime hours worked by each employee and calculation of the amounts due under the Fair Labor Standards Act.

This splitting of the function of adjudicating employees' claims is not only impractical, but it frustrates the long established principle of arbitrating employee wage grievances. It is not limited to claims asserted under the Federal Wage and Hour Act. The traditional wage grievance ordinarily raises one or more legal questions in the form of questions of construction of the collective bargaining agreement and under the Circuit Court's ruling "the Court must take the responsibility" of answering them (R. 96).

The same bifurcation of judgment and attendant confusion will result in subsequent cases when the problem of the scope and effect of the 1941 settlement (R. 42-44) is reached. Dealing with this issue, the Circuit Court properly recognized that *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945), left open the effect of a *bona fide* dispute followed by an accord and satisfaction (a question presumably to be explored in *D. A. Schulte Inc.* v. *Gangi*, October Term, 1945, No. 517, certiorari granted, November 19, 1945), when it said (R. 84):

> "But we do not see how the facts of this case, *at any rate on the state of the record now before us*, bring the claim here involved within the exception

mentioned by the Supreme Court as legally permissible." (Italics ours.)*

In the District Court, petitioner offered no evidence to show that the 1941 settlement was a *bona fide* settlement for the obvious reason that these facts were deemed immaterial to the issue of its right to a stay pending arbitration under Section 3 of the United States Arbitration Act. Both the District Court (R. 71) and the Circuit Court (R. 96) agreed with petitioner's position in this respect. Nevertheless, the Circuit Court *"on the state of the record now before us"*, proceeded finally to determine the issue.

As a measure of self-protection against summary treatment in subsequent cases, petitioner and other employers, will call upon the District Court to hear evidence showing that the United Mine Workers of America, as collective bargaining agent, asserted claims on behalf of the employees in "occupations continuously manned;" that the 10% wage adjustment granted them under Section 7 of the 1941 agreement (R. 43-44) was in "full settlement and satisfaction" of such claims; that there were good grounds for disputing such claims; that this group of employees were treated differently from the much larger group of miners then working a 7 hour day and a 5 day week (who obviously had no claims under the Act while

---

* In ruling the 1941 settlement ineffective, the Court below repeated its error of assuming power to decide questions of fact and law, other than the existence of the arbitration agreement and respondents' default, and, in any event, deciding them without affording petitioner "its day in Court." Moreover, on this phase of the case, the Court apparently precluded, as a matter of law, any partial set-off of the amounts paid respondents as increased wages under the 1941 agreement solely as a settlement of their overtime claims under the Fair Labor Standards Act, if any valid claims then existed. We know of no other decision in any Court dealing with this novel question of law. It should be pointed out, too, that this is the only legal question affecting the *merits* of the respondents' case of which petitioner seeks review in this Court. Any ruling on this third question would only serve as a guide to the Board of Conciliation if this Court agrees with our position on the second question.

working a 35 hour week) because of their longer hours and generally higher wage rates and earnings. Depending again upon the findings of the District Court as to the existence of a *bona fide* settlement, the cases would be dismissed or sent to the Board of Conciliation for calculation of any additional wages due the affected employees.

This unhappy division of functions between the Court and the Board of Conciliation can only be resolved by review in this case. For on review, this Court may rule, as petitioner contends, that all questions of fact and law affecting the merits of the controversy are questions for the arbitrator; or it may decide that the Circuit Court was correct in splitting the functions; or conceivably it may rule that claims of this nature are not arbitrable and restore the entire controversy to the District Court for decision.

Whatever this Court might eventually decide, it would be preferable to the unsettled situation resulting from the Circuit Court's decision.

Conclusion

For the foregoing reasons, petitioner respectfully prays that the order of this Court denying its petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit be reheard and reconsidered and that the petition be granted.

THE HUDSON COAL COMPANY,
Petitioner.

By WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.

February 26, 1946.

Counsel's Certificate

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioner.